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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 802-803
(see 818-836)

DEBARDELEBEN COAL CORPORATION,
Petitioner,

versus

LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE AND EX-OFFICIO CITY TREASURER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

And

BRIEF IN SUPPORT THEREOF.

ARTHUR A. MORENO,
Attorney for Petitioner.

LEMLE, MORENO & LEMLE,
(Of Counsel)

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PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The DeBardeleben Coal Corporation prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered on the 5th day of March, 1948, reversing a judgment of the United States District Court for the Eastern District of Louisiana and remanding the case for further proceedings. The Judge of the United States District Court wrote an opinion holding that the assessment

upon which the taxes were collected, and for which suit for refund was instituted, was void and that the DeBardeleben Coal Corporation was entitled to recover the taxes paid under protest in accordance with Act 330 of the General Assembly of Louisiana of 1938. The United States Circuit Court of Appeals reversed the decision, holding that the assessment upon which the taxes were collected was not void *in toto*, but was void only as to the inclusion therein of property having a permanent situs in Alabama.

JUDGMENT OF COURT OF APPEALS.

The judgment of the United States Circuit Court of Appeals was entered on March 5, 1948, and a rehearing refused on April 13, 1948, and reported as "Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer v. DeBardeleben Coal Corporation, No. 12116" and "Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer v. DeBardeleben Coal Corporation, No. 12124" and were consolidated.

JURISDICTION.

The jurisdiction of this court is invoked under § 240 of the Judicial Code as amended by the Act of February 13, 1925, C. 229, § 1, 43 Stat. 938 (28 U. S. C. A. § 347).

THE QUESTION PRESENTED.

(1) The question presented is whether taxes exacted by the City of New Orleans and paid under protest violates

the "due process of law clause" of the 14th Amendment to the Constitution of the United States, and that the assessment upon which the tax is based included property situated in Louisiana as well as property situated in Alabama, which had never been in Louisiana and which assessment was made by the Louisiana Tax Commission without segregation, but as a whole, and is void, and not merely reducible by the Court acting as an assessing authority, and

(2) Whether Act 152 of 1932, as amended by Act 59 of 1944, embodying the proportionate theory of taxation to railroad stock, can be applied to barge lines which have no fixed routes and with unknown mileage, and

(3) Whether, conceding that such act can be validly applied to barge lines operating over no fixed routes, and having no average number of watercraft daily in the State of Louisiana, it can be the basis of an assessment for the taxation of property used in interstate commerce, and

(4) Whether, conceding that such a statute can have application to watercraft engaged in interstate commerce, and owned by a foreign corporation, such watercraft can be taxed on a mileage basis, when the number of miles within and without the State is unknown, and when the taxing authorities testify that the assessment is made on no known fact, but is purely an arbitrary assessment, without knowledge of the number of miles traveled with-

in the State of Louisiana and the number of miles traveled without the State of Louisiana, and

(5) Whether a tax can be exacted by the State of Louisiana on an assessment made by the Louisiana Tax Commission, not in accordance with its statutory authority, but upon a basis which the individual members of the Louisiana Tax Commission considered fair, by taxing the watercraft on an arbitrary percentage of value, leaving to other states a percentage to be applied by such states to the watercraft, probably based upon the length of time such watercraft may be in other states.

THE STATUTE INVOLVED.

The statute involved is Act 152 of 1932 of the General Assembly of Louisiana as amended by Act 59 of 1944 of the General Assembly of Louisiana.

STATEMENT.

The two cases of the DeBardeleben Coal Corporation against Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, were combined with the cases of the American Barge Line Company, the Mississippi Valley Barge Line Company and the Union Barge Line Corporation against the State Tax Collector and the Commissioner of Public Finance of the City of New Orleans. The question presented was whether or not the tugboats and barges of these four corporations had a taxing situs in the State of Louisiana subjecting them to the pay-

ment of ad valorem taxes. Each of these corporations were organized under the laws of Delaware and domiciled at Wilmington, in the State of Delaware, with the exception of the Union Barge Line Corporation, which was organized under the laws of Pennsylvania and domiciled at Pittsburgh in that state.

The United States Circuit Court of Appeals found that the watercraft of the American Barge Line Company, the Mississippi Valley Barge Line Company and the Union Barge Line Corporation had no taxing situs in Louisiana, but found that the watercraft of the DeBardeleben Coal Corporation did have a taxing situs at New Orleans, in the State of Louisiana, notwithstanding its organization under the laws of Delaware and its domicile at Wilmington, in that state. The question presented does not involve a question of fact as to the situs of the watercraft, but involves the method of assessment, as being unconstitutional and resulting in the taking of the property of the corporation in violation of the Constitution of the United States.

The United States Circuit Court of Appeals said, with regard to the finding of the United States District Court, the following:

> "With respect to DeBardeleben, it found that New Orleans was the home port of its tugboats and barges, from which they operated; that with the exception of the eight barges in Alabama, its watercraft were never permanently away from that city;

hence the tax situs was in Louisiana and the tugboats and barges having a tax situs there could be taxed by the City of New Orleans. But the court further found that in assessing the tugboats and barges there had been included in the assessment the eight barges permanently located in Alabama, and that such fact made the city tax against DeBardeleben illegal, null, and void. The correctness of these rulings with respect to the several companies is the sole question before us."

The court further said:

"Each of the appellees asserts that, the State of its domicile being elsewhere, it is liable to assessment in Louisiana only upon a showing that the watercraft had a permanent situs within the State during the tax years; and that no such showing was made. DeBardeleben further asserts that the lower court was right in setting aside the assessment made against it upon finding that the value of eight barges in Alabama had been included in the total value from which the local assessments were made."

The court further said:

"The fact that the amount assessed against DeBardeleben was arrived at by including the value of the eight barges in Alabama is not ground for declaring the assessment against that company void. The taxpayer was called upon to furnish informa-

tion and make its rendition for each of the tax years. Taking the position that it owed no tax, it refused to furnish any information and thus forced the taxing authority to get its information as best it could. Under the local law if the taxpayer does not make a return, the taxing authority 'shall himself fill out said list from the best information he can obtain'. The DeBardeleben Coal Corporation was assessed 25% of the value of its tugs and barges. It urges that this was an excessive assessment, arbitrarily made without information either as to the miles it operated within the State in carrying on its business or as to the value of its properties. The evidence indicates that the taxing authority had little information upon which to act and that the assessments were made from estimates based on meagre and uncertain data. This was due in a large measure to DeBardeleben's refusal to furnish requested information. Instead of acting arbitrarily, the taxing authority obviously made the assessments from the best information it could obtain".

The court further said:

"In decreeing the assessments against DeBardeleben void, the court below erred. The erroneous inclusion of property in an assessment is ground for reduction, not cancellation. *Griggsby Construction Co. v. Freeman*, 108 La. 435, 32 So. 399.

The DeBardeleben suits in effect are suits for cancellation, not reduction of the assessments, and, though under Louisiana practice reduction, in the absence of an alternative plea therefor, may not be decreed in a suit for cancellation, *Fidelity Mutual Life Insurance Co. v. Fitzpatrick*, 125 La. 976, 52 So. 118, 120, a more liberal rule is followed in the federal courts. Under Rule 54 (c), Federal Rules of Civil Procedure, relief to which a taxpayer is entitled may be granted even though not demanded. The DeBardeleben suits will, therefore, be remanded in order that the court below may ascertain from the present record, or that record supplemented by additional evidence, whether DeBardeleben has paid excess taxes for the tax years, and, if it has, under Act 330 of 1938, order a refund of the excess paid, with interest".

CONCLUSION.

The judgment of the United States Circuit Court of Appeals in this case in effect held that although the Louisiana Tax Commission was empowered, under Act 152 of 1932, as amended by Act 59 of 1944, to assess the property of the DeBardeleben Coal Corporation on a proportionate mileage basis of miles traveled within and without the State, that an assessment not based upon such mileage, but based upon an arbitrary assessment made by the Louisiana Tax Commission on the basis of the conception

of fairness by the members of the Louisiana Tax Commission to other states, did not violate the due process clause of the 14th Amendment to the Constitution of the United States. The court, in effect, further held that the water equipment of the DeBardeleben Coal Corporation, outside of the State of Delaware, the State of its incorporation, could have a taxing situs in several other states, since it upheld the authority of the Louisiana Tax Commission to allocate 25% of the value of the property of the petitioner, leaving 75% of such value to other states for taxing purposes. The decision, in effect, held that outside of the state of incorporation, various states could tax the property of the DeBardeleben Coal Corporation on a percentage basis selected by such states and theoretically aggregating 100% of the value of such property.

The court further held that where the Louisiana Tax Commission made an assessment of $187,500 (Mann's Testimony) on towboats and barges situated in Louisiana, and barges situated in Alabama, which had never been in Louisiana, that the assessment was not void as an entirety, and remanded the case to the United States District Court for the elimination of the barges situated in Alabama as a part of the assessment, and thereby substituted the judicial function for the administrative authority of the Louisiana Tax Commission.

It is, therefore, respectfully submitted that for the reasons stated herein this petition for a writ of certiorari should be granted.

ARTHUR A. MORENO,
Counsel for Petitioner.

LEMLE, MORENO & LEMLE,
(Of Counsel)

May 11, 1948.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The jurisdiction of this Court is invoked primarily upon the holding of the United States Circuit Court of Appeals that an assessment made by the Louisiana Tax Commission, the assessing authority, which included barges of the DeBardeleben Coal Corporation situated in Alabama, and never subject to the taxing power of Louisiana was not void, but subject to correction by judicial elimination of the barges not subject to taxation.

The jurisdiction of this court is invoked on the further ground that the Louisiana Tax Commission, purporting to act under Act 152 of 1932, as amended by Act 59 of 1944, did not assess the property of the petitioner on the proportionate theory basis, but based the assessment upon the conception of fairness of the members of the Louisiana Tax Commission to other taxing states. The Louisiana Tax Commission did not tax the watercraft of the DeBardeleben Coal Corporation as if it had a taxing situs in Louisiana, but taxed it upon the theory that all states through which this watercraft operated has the right to tax the property on some percentage basis.

The percentage chosen by the Louisiana Tax Commission for taxing the property in Louisiana was admittedly an arbitrary assessment, without any knowledge of the mileage within Louisiana and the mileage without Louisiana, nor of the time spent in Louisiana in propor-

tion to the time spent elsewhere. Apparently, the watercraft was taxed upon a time basis, measured by the time the watercraft remained in Louisiana, and leaving to other states the right to tax this same property on the time it remained in other states. These facts must appear from an examination of the record and the uncontradicted testimony of the members of the Louisiana Tax Commission. The contention here made is that such a system of taxation, resting upon no principle of law, but upon a mere choice of methods by the Louisiana Tax Commission, is arbitrary, unreasonable and capricious, and violates the constitutional protection of the due process clause of the 14th Amendment to the Constitution of the United States.

The DeBardeleben Coal Corporation is organized under the laws of Delaware and domiciled in Wilmington, in that State. It operates a water transportation system with termini at Carrabelle, Florida and Houston, Texas. The tugboats and barges of the petitioner are used in the transportation of freight in interstate commerce upon the waterways of Louisiana and in the Intracoastal Canal between Florida and Texas. Its water equipment used in such transportation system, passes through the City of New Orleans, and, because of a union contract, its crews lay over for a period of twenty-four hours each six days. Sometimes, because of the exigencies of interstate commerce, there is an accumulation of lay-over time in the City of New Orleans.

Act 59 of 1944, which amends Act 152 of 1932, under which the Louisiana Tax Commission purported to act, defines movable property as including "the boats, barges

and other watercraft and floating equipment of water transportation lines", and provides for the assessment of such property as follows:

> "the portion of all such property of such person, firm or corporation shall be assessed in the State of Louisiana, wheresoever *(situated)*, in the ratio which the number of miles of the line, within the State bears to the total number of miles of the entire line, route, or system, here and elsewhere, over which such movable personal property is so operated or so used by such person, firm or corporation".

The United States Circuit Court of Appeals found that eight barges included in the assessment of eighteen barges, were in Alabama and never subject to the taxing power of Louisiana, and remanded the case to the United States District Court so as to find an assessment of the property in Louisiana by eliminating from the assessment the property in Alabama. The effect of the decision is to take away from the Louisiana Tax Commission the authority to put a value upon the property for purposes of assessment as the basis of the tax, and to remit to the United States District Court the duty of ascertaining the facts measuring an assessment, and to invade the administrative field to fix the assessment. The law of Louisiana does not give to its courts the power to fix assessments, but only the authority to declare whether an assessment is correct or excessive and to order the assessing authority to correct the assessment. In this case, the Louisiana Tax Commission is not before the court and is not ordered to correct an assessment, but the judge of the United States District Court is ordered to fix the measure

of value and, upon that measure of value, the petitioner must pay the tax.

The judgment of the United States Circuit Court of Appeals in effect seeks to correct the assessment through the judicial function on the theory that the assessment was excessive. The petitioner has at all times disclaimed that it is seeking a correction of an assessment, but instead was seeking to recapture taxes paid on a void assessment, so that its right to the taxes either stood or fell upon whether the assessment was constitutional or unconstitutional. The unconstitutionality of the assessment was based upon the claim none of the property had a taxing situs in Louisiana and so was not subject to the sovereignty of Louisiana. The United States Circuit Court of Appeals found as a fact that some of the property did have a taxing situs in Louisiana, and for the purposes of this petition, and for that purpose alone, it is conceded that the fact of situs, except the barges in Alabama, is not before the court.

However, it also found that some of the property in the assessment had never been in Louisiana. The claim is made here that since all of the barges and all of the towboats were assessed *in globo*, and the barges in Alabama, for purposes of assessment, were not segregated from the barges in Louisiana, the assessment in its entirety must fall, and is not subject to correction by judicial process. If the judgment of the United States Circuit Court of Appeals must stand, then, the judge of the District Court of the United States must undertake to ascertain the value of each barge in Alabama and the value of each towboat

and each barge in Louisiana, and must then deduct the value of the Alabama barges from the assessment, and the petitioner must pay the tax on the value so found. It must readily appear that if the State of Louisiana as a sovereign, has conferred power upon the Louisiana Tax Commission to ascertain the facts of value, and has conferred upon no Louisiana court the power to ascertain these facts of value and to fix the assessment thereon, that a federal court has no such power. If it could be otherwise, in case of a difference as to the value of the Alabama barges, the judicial judgment would overcome the administrative judgment notwithstanding that Louisiana as a sovereignty has confined to the Louisiana Tax Commission the duty of ascertaining values and fixing assessments.

The judicial process does not turn upon either the complexity or the simplicity of the problem. If the district court had the power to inquire into the question of the assessment of the barges located in Alabama, then, equally, it would have the power to determine the value of other kinds of property situated in Alabama if included in the assessment. The difficulty of ascertaining the extent and value of differing and different kinds of property would necessarily appall the judicial mind at the inception of the inquiry. The unconstitutionality of the assessment cannot be made to turn upon how readily the court may reach a conclusion as to the property to be excluded, or the value of the property so excluded. The simplicity of the problem here in no wise enlarges the power of the Louisiana court, and, consequently, bestows no power on a federal court to fix property values. The eight barges in Alabama, wholly beyond the taxing power of Louisiana, on

which the tax was paid, are readily identifiable, but the identity of the barges is not the fact to be resolved by the court. The court must fix the value of these barges and deduct that value from the entire assessment. The legal effect of this is to fix the value of the barges in Louisiana, since the deduction of the value of the barges in Alabama from the total assessment inevitably fixes the value of the barges in Louisiana. Thus, a district court fixes the value of property subject to the taxing power of Louisiana, notwithstanding that the state has confided that function to the Louisiana Tax Commission.

What must be kept in clear distinction is not the correction of an assessment, but the recovery of money exacted from the DeBardeleben Coal Corporation under the guise of a tax. The tax has been collected on property outside of Louisiana. If the assessment were corrected, it could not destroy the fact that when the tax was exacted, it was exacted on a void assessment, and, consequently, was taken by the tax collector without authority, since the nullity of the assessment was in legal intendment no authority for the tax collector to take the money. The right of the taxpayer must be judged as of the time that the tax was collected under the pseudo authority by which the collector acted. If the collector acted in taking the tax when there was no authority for him to do so, because the collection rested upon a nullity, then, he took it improperly and, having taken it improperly, he must return it. To order him to return a part of the tax, based upon the assessment of the barges in Alabama, would be in effect for the court to correct the assessment and to affirm his act in unconstitutionally collecting a tax. A nullity is with-

out life and courts cannot vitalize such a nullity by judicial decree. If the assessment was a nullity at the time of its making, because it unconstitutionally created the basis for the taxing of property in another state, then, it could not have any legal effect and could not be the authority for the City Treasurer to collect the tax. If the collector had no authority to collect the tax, then, it came into his hands improperly and must be returned since the courts are without power to make rightful that which was *ab initio* wrongful.

An Assessment by the Louisiana Tax Commission Which Includes Property in Alabama, is an Absolute Nullity and Beyond Correction by a Court.

California v. Pacific Railroad Co., 127 U. S. 1, 29:

> "If the state board includes in its assessment any more of the railroad property than it is authorized to do, the assessment will be *pro tanto* illegal and void. If the unlawful part can be separated from that which is lawful, the former may be declared void, and the latter may stand; but if the different parts, lawful and unlawful, are blended together in one indivisible assessment, it makes the entire assessment illegal".

Where an assessment is indivisible and does not separate the taxable from the non-taxable property, the assessment is void. In this case, the assessment was based upon the inclusion of the non-taxable property with the taxable property. A tax collected on such a basis is unconstitutional, and if the state sought to collect a tax on such

an assessment, the court would deny the collection of the tax.

This principle is enunciated in *Santa Clara County v. Southern Pacific Railroad Company*, 118 U. S. 394, 416, wherein the court said:

> "The case as presented to the court below, was, therefore, one in which the plaintiff sought judgment for an entire tax arising upon an assessment of different kinds of property as a unit—such assessment including property not legally assessable by the State Board, and the part of the tax assessed against the latter property not being separable from the other part. Upon such an issue, the law, we think, is for the defendant; an assessment of that kind is invalid and will not support an action for the recovery of the entire tax so levied. Cooley on Taxation, 295-6, and authorities there cited; *Libby v. Burnham*, 15 Mass. 144, 147; *State Randolph, & c., v. City of Plainfield*, 38 N. J. Law (9 Vroom) 93; *Gamble v. Witty*, 55 Mississippi, 26, 35; *Stone v. Bean*, 15 Gray, 42, 45; *Moshier v. Robie*, 11 Maine (2 Fairfield), 137; *Johnson v. Colburn*, 36 Vt. 695; *Wells v. Burbank*, 17 N. H. 393, 412".

Here, the Louisiana Tax Commission has placed an assessment upon the barges coming into Louisiana, and the barges in Alabama, but has assessed them all *in globo*, so that the assessment is not separable or divisible, but is all-inclusive of both taxable and non-taxable property. The assessment would be separable and divisible if it had placed an assessment upon the barges in Louisiana by a specific designation, and had placed an assessment upon

the barges in Alabama by a specific designation. The court would eliminate those barges especially designated as being non-taxable, from those barges especially designated as being taxable, and could hold that the part of the assessment relating to the Alabama barges was unconstitutional and void, while upholding the assessment of the barges especially designated as being in Louisiana. However, the Louisiana Tax Commission has not made such a separation, and, consequently, under the cited case, it is no function of the court to attempt the segregation of barges into those which are taxable and those which are non-taxable, and place a value on the taxable barges and a value on the non-taxable barges so as to arrive at a judicial assessment.

Clearwater Timber Co. v. Shoshone County, Idaho, 155 Fed. 612, 631:

> "In other words, it is asserted by complainant, and not controverted by defendants, that a joint and unappropriated assessment of taxable and nontaxable property is void in toto. And the proposition seems to be amply supported by authority. See California v. Railway Co., 118 U. S. 417, 6 Sup. Ct. 1144, 30 L. Ed. 125; California v. Railway Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; Truck Co. v. Territory, 62 Pac. 987, 10 N. M. 416; Title Trust Co. v. Aylsworth, 66 Pac. 276, 40 Or. 20; Hart v. Smith, 34 N. E. 661, 159 Ind. 182, 58 L. R. A. 949, 95 Am. St. Rep. 280; Railroad Co. v. Phillips, 82 N. W. 767, 111 Iowa, 358; Lancy v. City of Boston, 71 N. E. 302, 186 Mass. 128; Towne v. Salentine, 92 Wis. 404, 66 N. W. 395; Johnson County v. Tierney, 76

N. W. 1090, 56 Neb. 514; Howcott v. Levee Dist., 46 La. Ann. 322, 14 South. 848; Sims v. Warren, 67 Miss. 278, 7 South. 226; Jennings v. Collins, 99 Mass. 29, 96 Am. Dec. 687; East Tenn. Ry. Co. v. Morristown (Tenn. Ch. App.) 35 S. W. 771; Fisk v. Corey, 141 Pa. St. 334, 21 Atl. 594; Strode v. Washer, 17 Ore. 50, 16 Pac. 926; Howe v. People, 86 Ill. 288".

It is beyond dispute that the DeBardeleben Coal Corporation did not claim that property situated in Louisiana, and subject to the taxing power of the State, had been excessively assessed, and, consequently, should be reduced. What the DeBardeleben Coal Corporation pleaded was that the tax was based upon a void assessment. It did not claim, nor does it now claim, that the assessment was a relative nullity, because there had been included in the assessment property subject to the taxing power of Louisiana, but excessively assessed. If an assessment, which is the measure of the tax, includes real estate in Louisiana, and real estate in New York, the assessment is not a relative nullity, but an absolute nullity, because there had been unconstitutionally exercised a power of taxation in fixing the assessment. In this case, the assessment did not segregate the property in Alabama from the property in Louisiana. It assessed all of the towboats and barges of the DeBardeleben Coal Corporation, regardless of whether they were situated in Louisiana or elsewhere and the tax was collected on property in the State and property out of the State. If all of the property of the DeBardeleben Coal Corporation had been situated in Alabama, and was assessed in Louisiana, and the tax collected on the

assessment, it undoubtedly would have been an unconstitutional collection.

The fact that only a part of the property was situated in Alabama, but nevertheless treated as if situated in Louisiana, infects the assessment with unconstitutionality, even though some of the property assessed had a taxing situs in Louisiana. The assessment was a unity and not segmented. It was indivisible. If all of the property had been situated in Louisiana, and had been overvalued for assessment purposes, a reduction of assessment would have been the prescribed remedy. However, where the State has no taxing power, but does mistakenly believe that it does possess such power, and collects taxes based upon a void assessment, the collection of the tax is an unconstitutional taking of property without due process. The issue is not the reduction of an assessment relatively null, but the recovery of money exacted as a tax based on an assessment absolutely null.

The case has been remanded for the purpose of having the lower court determine what a proper assessment should be. This Court has repeatedly refused to fix freight or passenger rates, but has inquired merely into the propriety of the action of the Interstate Commerce Commission, and has referred the matter back for the ascertainment of the proper rates. *Texas and Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426. Public utility rates have been attacked as an unconstitutional taking of property, but the courts have never substituted their conferred power for the delegated authority of administrative bodies. Equally, the courts have announced in all cases the principle that courts will not fix assessments, but will

enforce the right of citizens to have assessments properly fixed by administrative bodies. The courts always recognize the limit defining the judicial from the executive branch of government. The Court of Appeal has remanded the case to have the lower court eliminate the value of eight barges in Alabama from the sum of the assessment contrary to the general principle that Courts declare principles of law governing assessments, but do not fix assessments. The assessment should be declared void and the tax an uncontitutional taking of property.

The Louisiana Tax Commission has no authority for assessing property except in accordance with statutory formula, and where it departs from such statutory power, the assessment is void.

There are certain fundamental rules of taxation which are elemental as well as fundamental. It is elemental that taxes cannot be assessed arbitrarily and must rest on a foundation firmer than the mere will of the assessing authority, or its untrammeled conception of fairness.

J. H. Cain, the Chairman of the Commission, in testifying as to the basis of the assessment, said:

> "You could call it a mileage basis or whatever you choose. If they had given us the mileage basis which we asked for we might have put it on that basis".

The basis of the assessment chosen by him was his conception of fairness. A conception of fairness as the basis of a tax can be only a statutory choice by the Legis-

lature, but cannot be the expression of an individual's conception of fairness. The requirement of the 14th Amendment is that the citizen must be advised of his rights by law, and that such rights cannot be left to the individual judgment or conscience of an administrative officer. If the measure of the right of an individual be what an administrative officer conceives it to be, then the right of citizens would vary according to the difference of conceptions of fairness of different officials and would vary from year to year as changes in officials might take place. The disease of indefiniteness and uncertainty would destroy the constitutionality of any taxing system based upon unrestricted and unlimited judgment and acts of administrative officers.

If the Louisiana Tax Commission had the authority to assess the property of the DeBardeleben Coal Corporation on the ratio of mileage traveled within and without the State, that system was not adopted because the Chairman of the Louisiana Tax Commission said that he did not make the assessment on a mileage basis, but "we estimated a value on all of their holdings and then made an arbitrary assessed value". He said he would not say the assessment was on a mileage basis, "but 'I would have to answer that it is purely an arbitrary figure because we failed to get the information from the taxpayer' ". He was not able to say that the 25% was figured on a mileage basis or just for the time this water equipment was in Louisiana and said:

> " 'I am not in a position to say it was a mileage basis, it was only an arbitrary estimated value because we failed to get any further information' ".

When asked how he arrived at the 25% *apportionment* which was adopted, he said:

> "'Just an ordinary figure, they might have been here a 100% of the time, or they might have been here more than 50% of the time, but we figure that that would be a fair assessment for the property in Louisiana'". It is clearly apparent that time and not mileage was the measure of the assessment.

The testimony of the other members of the Commission is to the same effect. None of them "know any definite basis for the adoption of 25% any more than 50% or 10%". C. C. Zatarain, a member of the Louisiana Tax Commission, when asked if there is anything which would justify the choice of one-third for assessment purposes, answered: "There is nothing indicating—it might have been one-half instead one-third. Or might have been three-fourths in the absence of any real basis for making the assessment." When asked if it were a fact one-third was chosen because it was believed to be fair, but there is no basis of reaching the conclusion of fairness he answered. "This file does not indicate it," and without any basis for choosing one-third the assessment was made "in the absence of the information having been furnished. I would say that would be arbitrary"; that the choice would be wholly an arbitrary choice, and that he did not know whether one-third or one-fourth or one-fifth would be the proper proportion to be allocated to Louisiana.

Clearly, the assessment, even if all of the property of the DeBardeleben Coal Corporation had been in Louisiana, and had been subject to assessment on the appor-

tionment theory, would have been unconstitutional, because it was purely a choice of methods by the members of the Louisiana Tax Commission, which was wholly and absolutely unauthorized to make such an assessment. The vice of the assessment is found in the implication that not only Louisiana, but every other state through which this water equipment operates may likewise impose a tax measured by time. Louisiana is not the state of incorporation and, therefore, may not tax upon the theory that having given life to the corporation, that theoretically the water equipment has a taxing situs in the state of incorporation. The State of Louisiana can tax only upon the practical fact that the property has acquired a situs in Louisiana. If it has acquired a practical taxing situs in Louisiana, then, it must be clear that it does not have such a factual situs in other states. The Louisiana Tax Commission evidently recognized that the watercraft of the DeBardeleben Coal Corporation did not have a taxing situs in Louisiana, because if it had such a situs, it would have been taxed to the full extent of the taxing power of Louisiana. However, Mr. Cain says he learned of the total amount of watercraft of the various companies, including the DeBardeleben Coal Corporation, and

> " 'The commission figured that 25% instead of the whole 100% would be a fair value for the amount of property in Louisiana. The Louisiana Tax Commission left 75% of the total valuation for the taxes of other states' ".

Union Tank Line Company v. Wright, Comptroller General of Georgia, 249 U. S. 275, presents a classical likeness to the issue here. In that case, the State of Georgia

made an assessment of the Union Tank Line Company property based upon the total mileage its cars were assumed to have traversed while being operated by leasing railroads, and, adopting a percentage based upon an assumed mileage traversed by the cars in the State of Georgia, made an assessment of $291,195.84. It was stipulated that the total value of the cars owned by the Union Tank Line Company was $10,518,333.16. It was estimated that the mileage in Georgia was 2.76846% of 251,999 miles, the entire mileage of these cars.

It was stipulated that the assessment against the plaintiff:

> "covered the value of at least three hundred and fifty cars in excess of the number of cars plaintiff actually had in the State of Georgia for the time said tax was assessed.
>
> "That defendant in entering said assessment never undertook to ascertain the actual property of plaintiff's located in the State of Georgia during the years or to assess its property at its real value for taxation, otherwise than by simply ascertaining the percentage of its entire property shown by the ratio of the railroad traversed by its equipment in Georgia and the railroad mileage traversed by its equipment everywhere as shown by its said return filed on March 16, 1914".

How much stronger is the compulsion of the facts in this case may readily be seen by an examination of the testimony of the taxing officials. In that case, the taxing authority of Georgia at least ascertained the total mileage

and the mileage in Georgia. In this case, its facts were wholly lacking and the assessment rested upon the fleecy foundation of fertile imaginations. The evidence shows that the taxing authorities, using a crystal ball, ascertained the mileage in Louisiana and the mileage outside of Louisiana traversed by the assessed property.

In cogent and clear language, the court in the cited case held that the method of assessment violated the "due process of law" clause. The court said that it had recognized the unit rule in the valuation of rolling stock and had approved it as a practical method of tax exacting, which violated no concept of a needed fair contribution to the support of government. *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70; *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 530; *Marye v. Baltimore & Ohio R. R. Co.*, 127 U. S. 117; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 26; *Adams Express Co. v. Ohio*, 165 U. S. 194. However, in that case that method did not result in the taxation of property subject to taxation, but taxed property not subject to the tax. The same result has been achieved in these cases. The adoption of the unit rule is based upon the fact that the property assessed is a part of a system. The system as a whole is valued and a part allocated to the state in which the tax is sought to be collected. That, however, is wholly different from valuing as a whole tank cars which are no part of the system. The value of the one is not increased by the value of the other, as they are separate entities, susceptible of individual valuation.

The court then said, after it discussed the unit rule, the following:

> "But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both".

The court further said:

> "In the present case the Comptroller General made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all States. Real values—the essential aim—of property within a State cannot be ascertained with even approximate accuracy by such a process; the rule adopted has no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one State while hundreds constantly employed in another moved over lines of less total length. Fifty-seven was the average number of cars within Georgia during 1913 and each had a 'true' value of $830. Thus the total there subject to taxation amounted to $47,310—the challenged assessment specified $291,-196.
>
> "We think plaintiff in error's property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce."

* * * * * * * * *

"In *Fargo v. Hart*, supra, we condemned an assessment ostensibly proportioned to mileage where property without the State and unnecessary to the Express Company's actual business has been included; and we pointed out that under no formula can a State tax things wholly beyond its jurisdiction."

Nashville C. & St. L. Ry. v. Browning, 310 U. S. 362, 365:

"The problem to be solved is what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions. Basic to the accommodation of these conflicting state and national interests is realization that by its very nature the problem is incapable of precise and arithmetical solution. In tapping these common sources of revenue a state cannot, we have held, use a fiscal formula, whatever may be its appearance of certitude, to project the taxing power of the state plainly beyond its borders. *Wallace v. Hines*, 253 U. S. 66".

* * * * * * * * *

"Wherever the states' taxing authorities have been held to have intruded upon the protected domain of interstate commerce in their use of a mileage formula, the special circumstances of the particular situation, in the view which this Court took of them, precluded a defensible utilization of the mileage basis. *Union Tank Line Co. v. Wright*, 249 U. S. 275; *Wallace v. Hines, supra; Southern Ry. Co. v. Kentucky*, 274 U. S. 76".

Conn. General Co. v. Johnson, 303 U. S. 77, 80:

"As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *New York Life Insurance Co. v. Held*, 234 U. S. 149; *New York Life Insurance Co. v. Dodge*, 246 U. S. 357; *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346; *Compania General De Tabacos v. Collector*, 275 U. S. 87. *Home Insurance Co. v. Dick*, 281 U. S. 397; *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143; *Boseman v. Connecticut General Life Ins. Co.*, 301 U. S. 196; *People ex rel. Sea Insurance Co. v. Graves*, 274 N. Y. 312; 8 N. E. (2d) 872; cf. *Provident Savings Life Assurance Society v. Kentucky*, 239 U. S. 103. It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within".

Here, the State of Louisiana has taxed towboats and barges employed in interstate commerce and remaining a greater portion of the time outside of the State in connection with that commerce, because of the activities carried on within the state. The irrelevance of these activities to the taxing situs is demonstrated by the holding of the court that it is the object taxed that must be within the dominion of the state and not the control of the activities connected with these objects of taxation. The tax in this case was based upon property remaining but a fraction of the time in the State of Louisiana.

The statute under which the Louisiana Tax Commission purported gave it the right to assess on a mileage and not a time basis. The Louisiana Tax Commission departed from its authority and chose a method of its own.

Conclusion.

We respectfully say that a writ of certiorari should be granted in this case because it affects not only the petitioner here, but the authority of other states through which watercraft operates to assess a tax upon a percentage basis. The Louisiana Tax Commission has adopted a method of assessing the watercraft of the petitioner on a percentage basis arbitrarily chosen, and leaving to other states the selection of a percentage basis which theoretically will aggregate 100% of the value of the property, but which might not necessarily do so because of the conflicting claims of various states as to the amount of the percentage of value which each is entitled to claim. The percentage theory repels the fact of permanence in any one state, but imports the idea of transitory situs in many

states, entitling each state to assess the property on a percentage basis, measured by no fixed formula. If the watercraft be taxable outside of the state of its organization, because of having acquired a fixed situs in some other states, it contradicts the conception that this actual situs, as distinct from domicilary situs, cannot be in several places at the same time.

The theory of apportionment by the Louisiana Tax Commission, and upheld by the decision in this case, is that outside of the state of its organization, watercraft may have an actual situs, at one and the same time, in a number of states, thereby giving rise to the power of taxation by each state, upon the theory of actual situs. The legal theory violates the physical rule that tangible property cannot be situated in more than one place at the same time. Unless the theory emerging from the decision of the United States Circuit Court of Appeals be overhauled and overturned by this Court, there will be constant conflict between the states, each striving for revenue by the imposition of taxes on the same property, based upon an actual situs of the property in a number of states at the same time.

It is further respectfully contended that the assessment of watercraft on a proportionate basis is not applicable, because watercraft does not travel over the same fixed routes as do railroad trains, which travel over rails permanently laid within the various states. The watercraft of the petitioner involved in this case may go to one point once or twice a year and never return. There is no fixed route which measures the mileage as the basis of the

proportion. The travel from one side of a river to another may increase the mileage, and the travel in one year may vary greatly from the mileage traveled in another year. The fixed routes which must be the basis of the apportionment theory for railroads is wholly absent as the basis of assessment for watercraft, since the routes are not fixed but are uncertain and vary from day to day, month to month and year to year. The practical needs of assessing railroad rolling stock, which has some semblance of logic, ought not to be extended to watercraft, where the results are wholly illogical and contrary to the long established jurisprudence of this Honorable Court.

It is respectfully contended that even if the proportionate theory of assessment be applicable to watercraft, that the assessment in this case is arbitrary, capricious and unreasonable. It is based, not upon the relative mileage within and without the State of Louisiana, but is based upon the selection by the Louisiana Tax Commission of a percentage of 25%. of the total value of the watercraft owned by petitioner even though some of such water craft never came into Louisiana, upon the theory that the watercraft remains in Louisiana for that proportion of time. The selection of the percentage rests upon the conception of fairness of the members of the Louisiana Tax Commission, and is intended to leave to other states the power of allocating 75% of the value of the property through which the watercraft operates. There is no fixed rule selected by the Louisiana Tax Commission for the assessment of this watercraft by other states, so that, in the final analysis, the Louisiana Tax Commission arrogates to itself the right to determine the assessment method of other

states, because it is conceivable that some of the other states through which this watercraft operates might contend that such states have the power of assessing this watercraft to the extent of its full value. While double taxation in given circumstances may not be an unconstitutional taking of property, yet, if the tax is based upon a taxing situs in each one of the states, it must result that each state would have the power to assess the property to the extent of 100%, so that the aggregate assessment would amount to confiscation. Nothing in the law nor in the principles of the taxing system justify the assessment in this case, with the consequent exaction of the tax, and unless certiorari be granted to resolve the many doubts raised by this decision, there will be confusion arising out of the principles of taxation chosen by the respective states through which this equipment might be operated. Not only because of the erroneous result reached in this case for the reasons herein given, but also in the avoidance of confusion, a writ of certiorari should be granted.

Respectfully submitted,

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LEMLE, MORENO & LEMLE,
(Of Counsel)

INDEX.

CITATIONS.

Cases:

CITATIONS—(Continued)

SUPREME COURT OF THE UNITED STATES

October Term, 1947.

Nos. 802 and 803.

DEBARDELEBEN COAL CORPORATION,
Petitioner,

versus

LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE AND EX-OFFICIO CITY TREASURER,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE, ETC., IN OPPOSITION.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 152) is reported at 166 F. 2d 509.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 5, 1948, (R. 160, 161) and a petition for rehearing was denied April 13, 1948 (R. 167). The petition for writ of certiorari was filed May 13, 1948. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. § 347).

QUESTIONS PRESENTED.

1. Whether petitioner, after arbitrarily refusing to give the Louisiana assessing authorities any information whatsoever, as to their watercraft, can now be heard to complain of the method of assessment used in taxing such watercraft.

2. Whether, even though the Louisiana laws give a taxpayer ample opportunity to correct a method or amount of assessment, by invoking the Louisiana Statutes, and a taxpayer refuses to follow such procedure, such taxpayer can ask a Federal Court to review the method of assessment.

3. Whether, when the Circuit Court of Appeals, in a broad interpretation of the Federal Rules of Civil Procedure, remands the case, to determine whether excess taxes were paid, the taxpayer, in the interim, can secure a review by this Court of the so-called method of assessment.

THE STATUTE INVOLVED.

The statute involved is Act 152 of 1932 as amended by Act 59 of 1944 of the Legislature of Louisiana.

Act 152 of 1932 provides, in part:

> "* * * the rolling stock or movable property of any railroad company, telegraph company, canal company or other transportation company, whose line lies partly within this State and partly within another State or States, or whose sleeping cars run over any line lying partly within this State or partly within another State or States, shall be assessed in this State in the ratio which the number of miles of the line within the State has to the total number of miles of the entire lines."

Act 59 of 1944, provides, in part:

> "Movable Personal Property.—All movable and regularly moved locomotives, cars, vehicles, craft, barges, boats and similar things, which have not the character of immovables by their nature or by the disposition of law, either owned or leased for a definite and specific term stated and operated (such, illustratively but not exclusvely, as the engines, cars and all rolling stock of railroads; the boats, barges and other watercraft and floating equipment of water transportation lines); * * *
>
> "(f) The movable personal property of such persons, firms, or corporations, whose line, route, or system is partly within this State and partly within another state or states, shall be by the Commission valued for the purposes of taxation and by it assessed; * * *

"I. The portion of all of such property of such person, firm or corporation shall be assessed in the State of Louisiana, wheresoever, in the ratio which the number of miles of the line, within the State bears to the total number of miles of the entire line, route or system, here and elsewhere, over which such movable personal property is so operated or so used by such person, firm or corporation."

STATEMENT.

DeBardeleben filed these two suits against the City of New Orleans to secure the return of taxes collected on their watercraft in Louisiana for the years 1944 and 1945, which taxes were levied under Act 152 of 1932 as amended by Act 59 of 1944 of the Legislature of Louisiana. Petitioner alleged that the tax was unconstitutional because it was a burden upon interstate commerce, because it violated the due-process clause of the State and Federal Constitutions, and in the alternative, if the taxing situs was in Louisiana the method used by the Louisiana Tax Commission was incorrect and resulted in an excessive assessment (R. 8, 9).

Petitioner never alleged that any watercraft wholly outside of Louisiana was ever assessed.

The United States District Court found no merit in petitioner's complaint as to the method of assessment and held that Louisiana was the taxing situs of the watercraft of "Coyle Lines" (trade name of DeBardeleben's

Marine Division) for the watercraft used in and through New Orleans and Louisiana. The District Court held, however, that Louisiana had the right to the whole of these taxes, and to partly tax under these Louisiana Statutes was illegal, null and void (R. 66).

Nor could the United States Circuit Court of Appeals for the Fifth Circuit find any merit in petitioner's allegation as to the method of assessment, the Court holding that the method of assessment was causd by DeBardeleben's own willful acts on their "refusal to furnish requested information" (R. 159). The Court of Appeals, however, reversed the District Court, holding that the City of New Orleans had the right to these taxes under the Statutes involved, and remanded the case to determine whether DeBardeleben paid excess taxes (R. 160).

Petitioner does not complain of the finding of the situs of this watercraft in Louisiana, but restricts its application for writ of certiorari to the question of the method of assessment.

ARGUMENT.

Petitioner's application discloses a very unique situation. It seeks to have this Court review a method of assessment on certain facts—which method of assessment was caused solely by its own capricious and arbitrary acts.

Briefly, the Louisiana Tax Commission (the assessing authority) sought by every means at its command to secure the value of petitioner's watercraft and its mileage within and without Louisiana. The Commission sent letters and even sent its field-men to petitioner's place of business, but DeBardeleben refused to give any of this information whatsoever. This is shown by the agreed stipulation in the record (R. 19). What was the Tax Commission then to do? It did the only thing left to do and filled in the return "from the best information it could obtain." This is in accordance with Louisiana law, when a taxpayer refuses the information (Act 170 of 1898 of the Legislature of Louisiana, Sec. 19). The Commission, in its desire to be absolutely fair, used the valuation of similar tow-boats and barges from other companies who had actually made returns to the Tax Commission, (R. 111) and did not use a "crystal ball" or "pull figures out of the air" as counsel would have this Court believe.

Thus, DeBardeleben itself caused the situation of which it now seeks here to complain! Now, at this late date, because the assessment does not meet petitioner's conception of correctness, it seeks the intervention of a Federal Court. It was never contemplated, under our law, that a litigant could benefit from its own willful and arbitrary acts. In other words, this is not a "game" of "hide and go seek" whereby the DeBardeleben Coal Corporation thwarts the Louisiana Tax Commission in its every effort to secure exact information and then seeks to have this Court protect it from the consequences of its own act.

If DeBardeleben believed the method or the amount of the assessment was wrong, it had ample opportunity for a hearing before the assessing authorities within a reasonable time, and could then appeal to the Louisiana Courts. (Act 39 of 1922 of the Legislature of Louisiana). It did none of these things. It chose to file a suit in Federal Court to test the constitutionality of the tax itself. This it had a right to do, but had no right, in that forum, to contest the method of assessment or the amount of the tax.

Petitioner does not seek a review here of the constitutionality *vel non*, of the tax itself, but seeks to inject the issue of the unconstitutionality of the method of assessment. Clearly, there is no Federal question presented in this application.

Both the United States District Court and the United States Circuit Court of Appeals for the Fifth Circuit, both found, *on a question of fact*, that there was no merit whatsoever in petitioner's contention as to the method of assessment. Neither of these Courts, at any time, found that the method of assessment employed by the Louisiana Tax Commission violated the due process of law clause of the Constitution.

The Circuit Court of Appeals, in its opinion (R. 153) shows:

> "The trial below resulted in judgment for each of the appellees, ordering the return of the taxes paid, the court holding * * * in the case of DeBardeleben, that, while Louisiana had the right to tax such of its property as had a tax situs in Louisiana, the assess-

ment on the proportionate rule basis as made was illegal, null, and void."

The Court of Appeals, of course, corrected the erroneous conclusion of the District Court, holding, in effect, that if Louisiana had the right to the whole of this tax, it could take but a portion thereof if it desired.

The Circuit Court of Appeals has remanded these two cases to the District Court to "ascertain from the present record, or that record supplemented by additional evidence, whether DeBardeleben has paid excess taxes for the tax years, and, if it has, under Act 330 of 1938, order a refund of the excess paid, with interest." (R. 160.) Thus, even though petitioner maintains that it never has at any time, complained of the amount of the assessment, the Court of Appeals has given them even more than that to which they are entitled, because their suits are not for a reduction of the assessment, but for a cancellation of the entire assessment, and under Louisiana practice, reduction, in the absence of an alternative plea therefor, may not be decreed in a suit for cancellation. *Fidelity Mutual Life Insurance Co. v. Fitzpatrick*, 125 La. 976, 52 So. 118, 120. The Court of Appeals, however, in a broad interpretation of Rule 54 (c), Federal Rules of Civil Procedure, is giving petitioner relief even though not demanded. These suits, therefore, now stand remanded to the District Court to obtain more facts as to the correct assessment. Thus, petitioner is getting all the relief to which it could possibly be entitled.

Petitioner seeks to inject here the issue of including "eight barges in Alabama" in the assessment. This ques-

tion was never raised by the pleadings. It was only raised in argument.

Louisiana never, at any time, included in its assessment, any barges wholly within the State of Alabama. This is clearly demonstrated by an examination of the actual assessment sheet of the Louisiana Tax Commission on DeBardeleben Coal Corporation (R. 69). This is the basis of the assessment and shows the levy against DeBardeleben Coal Corporation, doing business as "Coyle Lines" (dba Coyle Lines). The trade-name "Coyle Lines" is the Marine Division of DeBardeleben Coal Corporation. The record shows that the eight barges in Alabama belonged to the Mining Division of DeBardeleben—a wholly different subsidiary. The Louisiana Tax Commission never, at any time, made an assessment of property of the "Mining Division" but solely of the "Marine Division" (Coyle Lines). The assessment was restricted to property used within the State of Louisiana and is further demonstrated from the quotation in petitioner's brief (p. 24) when the Chairman of the Louisiana Tax Commission testified "that would be a fair assessment *for the property in Louisiana*". (Emphasis ours.)

Possibly, because petitioner has sought to cloud the issue with this reference to the inclusion of certain barges in Alabama, the Circuit Court of Appeals deemed it advisable to remand the matter to ascertain the exact situation. For even if true (which respondent vigorously denies) the Court of Appeals decreed:

> "The erroneous inclusion of property in an assessment is ground for reduction, not cancellation.

Griggsby Construction Co. v. Freeman, 108 La. 435, 32 So. 399." (R. 159.)

There is no jurisdiction, therefore, in this Court, to grant a writ of certiorari, because there is no Federal question involved; further, these two cases now stand remanded to the District Court for further evidence as to the amount of the assessment, and to ascertain what is actually included.

The cases cited and quoted from by counsel for petitioner find no application here. They are not at all analogous to the issue presented here, and we shall attempt to briefly show this.

California v. Pacific Railroad Company, 127 U. S. 129, and *Santa Clara County v. Southern Pacific Railroad Company,* 118 U. S. 394, involved state taxation of franchises received from the United States Government and which it was prohibited from taxing by the constitutions of the state or the United States. The Court in *California v. Pacific Railroad Company (supra)* stated in conclusion:

> "This renders it unnecessary to express any opinion on the application of the Fourteenth Amendment, as the result would not be different whatever view we might take on that subject."

The next case quoted from by counsel for petitioner, *Clearwater Timber Company v. Shoshone County, Idaho,* 155 Fed. 612, 632, involved the taxation of land owned by the United States Government, before the transfer was completed to plaintiff, and consequently complainant was

not the owner of this land at the time taxes were levied, title being in the United States. It is interesting to note that immediately after the quotation on page 19 of petitioner's brief, the Court had occasion to observe:

> "However, I do not decide what, if any, application of this principle would have to the record in this case if it appeared that a part of the lands in evidence were subject to taxation. I am of the impression that I would seek hopefully for some method under the law by which the plaintiff would be required to pay a just proportion of the taxes before it received protection against that which was unjust. But, it being my view of the law that none of these lands were subject to taxation in 1903 and 1904, complainant's prayer is not beset with any equitable objections. It had and has no duty either at law or in equity to pay these taxes in whole or in part. * * *
>
> "I have no disposition to assist parties in escaping a just proportion of the burden of taxation on account of technical defects in the proceedings of revenue officers in levying and enforcing the payment of taxes. * * *"

Texas and Pacific Railroad v. Abilene Cotton Company, 204 U. S. 426, indicates that petitioner should have pursued its remedy, if any, through the Louisiana Tax Commission, which respondent has always contended.

Much reliance is placed by petitioner on *Union Tank Line Company v. Wright, Comptroller General of Georgia*, 249 U. S. 275, 39 S. Ct. 276. That case differs widely from the issue here. While approving, in effect, the tax apportionment principle on a mileage basis, the Court held

that even though Georgia knew the exact number of cars in the State at a given time (as admitted in the agreed stipulation) they adopted a plan so arbitrary as to unduly burden interstate commerce. In that case, a correct return *was filed* by the Union Tank Line Company—in the instant cases *no return* was filed, even though requested, effectively keeping from the Louisiana Tax Commission the data needed. The *Union Tank Line Company* case *(supra)* was decided on a question of fact. The facts in the present cases are wholly in favor of respondent's position.

The information needed lies wholly within the breast of the taxpayer. For, if the state authorities were required to keep a check, either upon the average use or aggregate mileage covered by the movements of interstate common carriers within the State, and to supplement this with observations in other states in order to arrive at the due proportion, the cost of administration easily might consume the tax.

Fargo v. Hart, 193 U. S. 490, 242 S. Ct. 498, is not at all applicable because Louisiana is not seeking to tax property wholly beyond its jurisdiction.

Counsel cites *Nashville Company & St. Louis Railroad v. Browning,* 310 U. S. 362, 60 S. Ct. 968, 973, which really substantiates respondent's position. In that case, Tennessee taxed this interstate carrier by taking the ratio which petitioner's mileage in Tennessee bore to its total mileage. After approving this principle of taxation, the Court went on to say:

> "We conclude, therefore, that the Commission's over-assessment of petitioner's property, if over-assessment there was, constitutes no deprivation of any right under the Federal Constitution."

The last case quoted from by petitioner, *Connecticut General Life Insurance Company v. Johnson*, 58 S. Ct. 436, 303 U. S. 77, involved the right of California to tax premiums of a Connecticut company on premiums received in Connecticut on reinsurance contracts—obviously inapplicable to the issue here.

Thus, counsel for petitioner has cited no case where a Court has found for petitioner on this issue—that is, the method of assessment, when the taxpayer has arbitrarily withheld the pertinent facts, nor can such a case be cited.

And it needs no citation of law by respondent to show that the issue here is purely a state function, when the state itself gives every opportunity for the correction of the method or amount of assessment, which method the present petitioner arbitrarily refused to invoke.

The Louisiana courts have had occasion to pass on this question of assessment.

In *Griggsby Construction Co. v. Freeman*, 108 La. 435, 32 So. 399, the Supreme Court of Louisiana stated:

> "We shall consider only the ground insisted on in the brief, and shall take them up in the order in which they are presented in the brief:

> "I. That the assessment includes property not belonging to plaintiff, and for the taxes on which plaintiff is not responsible: Suffice to say that plaintiff, having been called upon by the assessor to furnish a list of its property, and having failed to do so, is, by the express terms of the revenue act (section 14), 'estopped from contesting the correctness of the assessment list filed by the assessor'."

In *Betron, etc., v. New Orleans,* 131 La. 73, 59 So. 19, the Supreme Court of Louisiana went on to say:

> "Plaintiff made no return of property for assessment, and is therefore estopped by the statute from contesting the correctness of the assessment list filed by the assessor. Section 25 of Act 170 of 1898. * * *"

It should need no citation of the law, however; simple common-sense, equity, logic and justice must decree that petitioner's position here is untenable.

CONCLUSION.

Petitioner is not seeking here a review of the law of situs in taxation, the issue being restricted solely to a question of the method of assessment.

The due process of law clause of the Fourteenth Amendment is fully satisfied by the Louisiana Statutes, which give a taxpayer the right of appeal to the assessing authorities to correct any discrepancy in the method or

amount of the assessment, and then a right of appeal to the Courts of Louisiana.

The DeBardeleben Coal Corporation refused to follow this procedure, refusing to apply for the relief granted them by the Louisiana law as to the method of this assessment. Petitioner, therefore, cannot now complain that there has been a taking of its property without due process of law, when ample opportunity has been afforded it to correct any alleged errors in the method of assessment.

The Circuit Court of Appeals correctly found that the taxing authorities could only do what they actually did in these two cases, and that is, make an assessment from the best information they could obtain in view of the arbitrary position taken by petitioner.

Thus, it is self-evident that petitioner has no right, and should have no right, to invoke the supervisory powers of this Court to review a method of assessment for which they were solely to blame, and for which the Louisiana law itself gives ample remedy.

In addition thereto, the Circuit Court of Appeals has remanded these cases, giving petitioner even more relief than that to which it is entitled, under these circumstances.

Patently, there is no Federal question presented here, and the application for writs of certiorari should therefore be denied.

Respectfully submitted,

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This is to certify that copies of this brief have been served on opposing counsel on this the 8 day of June, 1948.

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